No. 92-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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ARGUMENT

A. Responednt's "Plain Meaning" Argument

Respondents and their supporting *amici curiae* all assert that the statutory provision at issue—§ 7(o)(2)(A) of the Fair Labor Standards Amendments Act of 1985 ("Amendments Act"), 29 U.S.C. § 207(o)(2)(A)—has a "plain meaning" that is so clear and unequivocal as to render illegitimate *any reference whatsoever* to the relevant administrative understanding, *viz.*, to the Department of Labor's regulation that supports petitioners' position. *See, e.g.* Brief of Respondents ("Resp. Br.") at 10-18; *Amicus* Brief of Missouri ("Mo. Br.") at 3-8; *Amicus* Brief of the National Association of Counties, *et al.* ("NACo Br.") at 7-10.

Specifically, respondents and their *amici* contend that the language of subclauses (i) and (ii) clearly and unambiguously indicates that an employee is "covered" by subclause (i)—and thus not within subclause (ii)—*only*

when his employer and his representative conclude an agremeent that allows for compensatory time off in lieu of overtime. Whenever there is no agreement with a representative that permits employer use of compensatory time, the employer may—regardless of the reason there is no agreement and even where the employees have a representative—implement the employer's chosen compensatory time policy through individual agreements under subclause (ii), which may be imposed on employees as conditions of employment.[1]

The only point regarding the statutory text that is clear is that this "plain meaning" contention is without any merit.

1. Section 7(o)(2)(A) draws distinctions based on the phrases "employees . . . covered by subclause (i)" and "employees described in" subclause (ii). But neither of these subsections refers to or describes any defined class of employees. Rather, subsection (i) refers to various kinds of agreements that an employer might enter with employees who are represented by some sort of representative. And, subsection (ii) refers only to "employees not covered by subclause (i)" and to agreements that an employer might enter directly with an employee, *viz.*, in the absence of a representative. As we noted in our initial brief, the Tenth Circuit, therefore, concluded as follows:

> We find the language . . . to be ambiguous. Subclause (ii) applies to 'employees not covered by subclause (i).' However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [*Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-17 (1989); *see also* Pet. Br. 20-21)].[2]

[1] Respondents also assert that the petitioners in this case never designated representatives for purposes of reaching § 7(o)(2)(A)(i) agreements. Resp. Br. 4. Given that petitioners have alleged to the contrary, and given that this case arises in the context of summary judgment motions, respondents' assertion on such a hotly disputed factual issue is improper. The Fifth Circuit properly decided this case on the opposite premise, accepting as true the allegations of the complaint. *See* Pet. App. 3a (stating that each petitioner designated a representative and the employer instituted its pay system without reaching any agreements with that representative).

2. It is equally to the point that respondents' proffered interpretation of § 7(o)(2)(A) makes the provision *entirely permissive*. On respondents' view, public employers would be free to implement their chosen compensatory time policy in lieu of overtime whenever the public employer chooses to do so simply by exercising the right to refuse to deal with the representatives of its employees on the issue of compensatory time. *See, e.g.*, Resp. Br. 12; Mo. Br. 5; NACo Br. 10. This result conflicts with the structure and design of this statute in at least three major ways.

First, respondents' interpretation assumes that Congress chose to draft § 7(o)(2)(A) in extremely complex and turgid statutory language even though Congress' goal was to convey an extremely simple concept: *viz.*, that public employers may use otherwise lawful compensatory time provisions whenever and however they

[2] Respondents and *amici* quote a passage from a concurring opinion in *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) (*en banc*), in which Judge Luttig finds no ambiguity "because the compound objects of the prepositional phrase 'pursuant to' in subsection (i) are the forms of agreements enumerated therein." *Id.* at 1397. *See* Resp. Br. 13-14; NACo Br. 10. Be that as it may, the object of the introductory prepositional phrase in subsection (ii)—*viz.*, "employees not covered by subclause (i)"—is "employees", not "agreements", and all "employees" referred to in subsection (i) are employees with representatives, since the prepositional phrase "between the public agency and representatives of such employees" modifies all the "agreements" in the subsection. That being so, neither Judge Luttig nor respondents explain why Judge Luttig's grammatical point (any more than our grammatical point) should conclusively determine the issues in this case.

choose to do so. If this was Congress' judgment, the almost 150 words used in § 207(o)(2)(A) were far from necessary. And, Congress certainly did not need to draw a distinction between different kinds of compensatory time agreements—as §§ 7(o)(2)(A)(i) and (ii) and as the subsequent paragraph dealing with transitional issues go to great lengths to do—since nothing of consequence would depend on any such distinctions.

Second, if respondents are correct in their interpretation, Congress simply would have had no reason to include *any* provision at all where § 7(o)(2)(A) appears in the statute. After all, § 7(o)(1)—the section immediately preceding § 7(o)(2)(A)—*standing alone* would have accomplished precisely the result respondents urge here. *See* § 7(o)(1), 29 U.S.C. § 207(o)(1) (public employers may use "in accordance with this subsection and in lieu of overtime compensation, compensatory time off"). Thus, respondents' construction of § 7(o)(2)(A) renders § 7(o)(1) and § 7(o)(2)(A) entirely redundant. *Compare Moskal v. United States*, —— U.S. ——, 59 L.W. 4025, 4027 (1990) (court should resist interpreting a statutory provision in a manner that renders statutory language surplusage); *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 562 (1990) (same); *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 837 (1988) (same); *Bowsher v. Merck*, 460 U.S. 824, 835 n.10, 836 (1983) (same).

Third, as drafted, § 7(o)(2)(A) is clearly written in the form of a provision intended *to limit* the discretion of public employers. The provision states that "[a] public agency may provide compensatory time . . . *only*" (emphasis added) under those circumstances that the provision describes—a formulation that strongly implies an intent to prohibit some class of employer efforts to provide compensatory time. Yet, respondents' construction leaves public employers free to utilize whatever otherwise lawful compensatory time program those em-

ployers might choose, regardless of how § 7(o)(2)(A) might apply, leaving the word "only" to serve no limiting function. Thus, once again, respondents' construction is in tension with the statutory design, converting seemingly significant language into mere surplusage. *See Bowsher v. Merck*, *supra*, at 835 n.10, 836; *see also Moskal*, *supra*; *Pennsylvania Public Welfare Dept.*, *supra*; *Mackey*, *supra*.

Under this Court's jurisprudence, any of these points would be sufficient reason to reject the notion that respondents' interpretation of § 7(o)(2)(A) constitutes the unmistakably "plain meaning" of the provision. As recent decisions have emphasized, application of this Court's "plain meaning" rule requires this Court to determine if there is an "unambiguously expressed intent of Congress" by "look[ing] to . . . the language and design of the statute as a whole." *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). *Cf. National Railroad Passenger Corp. v. Boston & Maine Corp.*, —— U.S. ——, 60 L.W. 4268, 4271 (1992) ("Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation . . . .").

3. Even if none of the problems we have just discussed existed—so that the interpretation of § 7(o)(2)(A) urged by respondents was far more compatible with the design of the statute than it is—it would still be appropriate for this Court to examine the provision's legislative history in order "to determine . . . whether there is a clearly expressed legislative intention contrary to" the proffered "plain meaning." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). *See also United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Comm'n. v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case, there is such a clear expression of legislative intent contrary to respondents' position. Specifically, the committee reports of *both* the House and the Senate squarely reject the interpretation urged by respondents.

Although there are differences between the House Report and the Senate Report, both clearly state that subsection (i) will apply—and therefore subsection (ii) will *not* apply—in any case in which employees *have a representative*. *See* note 3, *infra*. In such cases the public employer is denied the option of imposing individual agreements. *See* H. Rep. 99-331, 99th Cong., 1st Sess. 20 (1985) (*reprinted at* Pet. App. 36a); S. Rep. 99-159, 99th Cong., 1st Sess. 10-11 (1985) (*reprinted at* Pet. App. 101a). *See generally* Pet. Br. 22 (quoting and discussing House and Senate Reports). Both reports show that if a public employer cannot reach an agreement with its employees' representative on the use of compensatory time, the employer would be required to pay for overtime in cash, as would any private sector employer. The employer would not be able—as respondents contend—simply to ignore the absence of an agreement with the representative and unilaterally impose individual agreements on its employees as individuals.[3]

Given that both legislative reports are firmly united in rejecting the purely permissive construction that re-

[3] To be clear, we add that the principal difference between the House Report and the Senate Report is on the issue of *when* employees are deemed to have a representative for purposes of being "covered by subclause (i)." The Senate Report refers to "recognized representative," implying that recognition by the employer or by operation of state law is a prerequisite to coverage under subclause (i). S. Rep. 99-159, *supra*, at 10. The House Report expressly rejects this, stating that "a representative . . . need not be a formal or recognized collective bargaining agent, as long as it is a representative designated by the employees." H. Rep. 99-331, *supra*, at 20. *See* Pet. Br. at 22-23 & n.12. In formulating its regulations, the Labor Department determined that the House Report more accurately described the statute's meaning. *See* Pet. Br. 14-15; *infra* at 8-9 & n.5.

What is important here, however, is that both reports conflict with respondents' proffered "plain meaning," under which an employer may use individual agreements regardless of the existence of a representative—recognized or otherwise—as long as no agreement with a representative permitting compensatory time has yet been concluded.

spondents assert as the statute's "plain meaning," respondents' construction simply cannot be deemed to constitute the meaning unambiguously intended by Congress. *See INS v. Cardoza-Fonseca*, *supra*. Accordingly, the assertion of the "plain meaning" rule by respondents and their *amici* should be rejected.

B. Respondents' Arguments Regarding The Department of Labor's Regulation

As we have shown in our principal brief, the Department of Labor's governing regulation—which was promulgated pursuant to an express mandate of Congress and after full notice and comment procedures—is fully supportive of petitioners' position, clearly reasonable in light of the statute's language, history, and overall policy, and fully deserving of enforcement by this Court under every principle of statutory interpretation. *See* generally Pet. Br. 10-19.[4]

Respondents in essence acknowledge the fact that the unambiguous language of the regulation supports petitioners' position. *See* Resp. Br. 27 (noting that "at first glance the words of these regulations may seem to support

[4] As we noted in our initial brief, the explicit regulatory text endorses petitioners' position in the following ways:

First, the regulation makes clear that whenever employees "have a representative" they are "covered by subclause (i)," regardless of whether any agreement permitting compensatory time under that subclause has been successfully negotiated. *See* 29 C.F.R. § 553.23 (b)(1). The regulation thus conclusively rejects the interpretation of § 7(o)(2)(A) which respondents continue to urge to this Court.

Second, the regulation unequivocally states (a) that an employee shall be deemed to "have a representative"—and thus deemed to be "covered by subclause (i)"—whenever the employee "designate[s]" a representative; (b) that "[i]n the absence of a collective bargaining" system, "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees;" and (c) that a public employer may utilize "individual agreements" *only* "[w]here the employees of [the] public agency do not have a recognized or otherwise designated representative." 29 C.F.R. §§ 553.23(b)(1) & (c)(1).

Petitioners' position"); *id.* at 29 ("assume[s] that the regulations are consistent with the petitioners' position). Yet respondents then go on to attack the regulatory text as inconsistent with the statute's legislative history and with the Secretary's contemporaneous comments that accompanied the issuance of the regulation. *See* Resp. Br. 16-17, 23-25, & 28-29. *See also* NACo Br. 11-20. These critiques of the regulation have no merit.

1. Respondents' argument that the Labor Department's regulation conflicts with the statute's legislative history is part of respondents' broader argument that petitioners' interpretation of the statute conflicts with Congress' intent. The argument focuses on the difference between the House and Senate Reports. *See* note 3, supra. As noted in our initial brief, the House Report fully and unambiguously supports the regulation—and petitioners' claims in this case—in all of its aspects, while the Senate Report in one respect does not offer such support. *See* Pet. Br. 14-15, 22-23. The Secretary concluded that the House Report—and not the Senate Report—accurately reflected Congress' intent. *See* Pet. Br. 11-12, 14-15.

Arguing that the Secretary erred in this conclusion, respondents assert that it was the Senate bill—and not the House bill—that Congress enacted into law. Accordingly, respondents argue that the Senate Report must be "deemed to be more persuasive" than the House Report. Resp. Br. 16-18 (*citing Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (legislative report that accompanied language which finally passed is more persuasive)).

Put bluntly, the truth is precisely the opposite of what respondents assert. There is simply no doubt that the final statutory language at issue came from—and is almost identical to—*the House Bill*. *Compare* Amendments Act § 7(o)(2) *with* H. Rep. No. 331, *supra*, at 2-3 (*reprinted* at Pet. App. 37a-38a) (showing final language to be almost identical to language of H.R. 3530, § 2(o)(2)). Thus, while the bill that was finally reported by the Committee of Conference and enacted into law by Congress was—as respondents point out—identified under the number of the Senate Bill, S.1570, the language of the provision at issue here originated in the House Bill and had been explained in the House Report. *Compare* H. Conf. Rep. No. 357, 99th Cong., 1st Sess. 2-3 (1985) (*reprinted at* Pet. App. 142a-143a) *with* H. Rep. No. 331, *supra* at 2-3 (*reprinted* at Pet. App. 37a-38a).[5]

The conferees' choice on the statutory language to be adopted, in other words, fully supports the Labor Department's decision to follow the House Report.

2. Respondents and their *amici* argue that the clear language of the Labor Department's regulation conflicts with the explanation of this language by the Secretary. On this basis they urge that the regulation should be interpreted—despite its clear and contrary text—to allow public employers in States without full collective bargaining to do virtually as they wish. But, in fact, there is no conflict between the regulatory text and the Secretary's explanation of that text. And the regulatory text gives no support to respondents' position. Although we have fully explained this point in our initial brief, *see* Pet. Br. 29-32, given respondents' insistence, we will repeat and elaborate on this point here.

a. The explanatory language at issue appears in the preamble that accompanied the Department of Labor's regulation. *See* 52 Fed. Reg. 2014 (quoted and discussed at Pet. Br. 30). The context was a commentators' concern that the Department's regulatory language might be construed as imposing full collective bargaining relationships on public employers and employees, in spite of state

[5] In contrast, the Senate language that had accompanied the Senate Report—although similar to the final language—does clearly differ in language and structure from the final enactment. *Compare* Amendments Act, § 7(o)(2) *with* S. Rep. No. 99-159, *supra*, at 2-3 (*reprinted* at Pet. App. 102a-103a).

laws prohibiting such arrangements. *Id.* In response, the Department pointed out that, contrary to the commentator's premise, the language allowed for the use of a "memorandum of understanding, or other agreement . . . between the public agency and the representative of the employees where the employees have designated a representative" (*viz.*, the use of agreements outside the context of full collective bargaining). Individual agreements would be permitted the preamble stated, only "[w]here the employees do not have a representative." 52 Fed. Reg. 2014-15 (quoted and discussed at Pet.Br. 30-31).

The preamble then stated as follows:

> The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA § 7(o) shall be determined in accordance with State or local law and practices. [*Id.*]

The preamble then turned to another commentator's concern that the regulatory language might allow employers outside of formal collective bargaining relationships to escape the restrictions of § 7(o)(2)(A)(i). In response, the Department "clarif[ied] the fact that the representative of the employees need not be a formal or recognized collective bargaining agent" and emphasized that "collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative." 52 Fed. Reg. 2014-15 (quoted and discussed at Pet.Br. 30-31).

b. Respondents and their *amici* claim that the indented language from the preamble makes clear that it was the Department's intention to allow States that do not permit formal collective bargaining for public employees the option of prohibiting all dealings with employee representatives *and* implementing the compensatory time arrangements of the State's choosing. *See* Resp. Br. 28-29; Mo. Br. 7 n.3; NACo Br. 16.

For a variety of reasons, this is an entirely unnatural construction of the language in question: *first*, there is absolutely no support for it in the statutory text; *second*, the indented language appears immediately between two explicit preamble statements that, in the absence of collective bargaining, it is *the designation* of a representative by an employee that places the employee within § 7(o)(2)(A)(i); and, *third*, the indented language also appears immediately before an explicit preamble statement that designation of a representative by the employee is the relevant test *even if the employer does not recognize* the employee's representative. *See* 52 Fed. Reg. 2014-15.

There is, moreover, a far more natural interpretation of the general statement contained in the indented language. As we explained in our initial brief:

> The Department's statement that "the question of whether employees have a representative . . . shall be determined in accordance with State or local law and practice," fairly read, simply explains that state law may be relevant in determining when employees "have designated a representative." Thus, when state law creates a method for employee designations of representatives—*e.g.*, through a collective bargaining system based on exclusive representation—that system will be sufficient under § 7(o), and § 7(o) will not be construed in a manner that disrupts the state's designation process. [Pet. Br. 31-32.] [6]

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[6] One of respondents' *amici* urge that the construction of the statute that the Department of Labor's regulation adopts "would be a prescription for chaos in public sector labor relations" in those States that prohibit exclusive representation, since public employers in such States might find themselves having to deal with different representatives for different employees. NACo Br. 17. Because the preamble language at issue—properly understood—gives States the option of structuring the process by which employees designate representatives in any reasonable manner that the State believes will avoid disorder or inefficiency, this concern has no merit. In any case, a public employer is always free to reject the option of seeking § 7(o)(2)(A) agreements and to adopt

c. Respondents' argument that the statutory and regulatory text at issue should be construed as not applying to those states, like Texas, that prohibit public-sector collective bargaining is premised on the notion that application of the regulatory understanding of § 7(o)(2)(A) to such states would displace their state prohibitions against collective bargaining. *See, e.g.*, Resp. Br. 22; NACo Br. 21. Nothing could be further from the truth.

First, nothing in petitioners'—or the Department of Labor's—interpretation of § 7(o)(2)(A) would ever require *any* public employer to negotiate with, to recognize, or in any way to acknowledge, any representatives of its employees. The entirety of our claim is that if a public employer fails to reach some sort of agreement with its employees' representatives, the employer will simply be bound by the normal Fair Labor Standard Act ("FLSA") overtime rules that bind private sector employers in our society, and that would have bound public sector employers if not for the passage of the Amendments Act. This grant to the States of an opportunity to exempt themselves from normal FLSA requirements can hardly be construed as "a requirement" that States abandon their policies of refraining from collective bargaining. *See* Pet. Br. 24-27.

Second, the text of the regulation relating to § 7(o)(2)(A) makes absolutely clear that collective bargaining in any normal sense of the term—*viz.*, a system involving exclusive representation, formal recognition, binding contracts, etc.—is *not* necessary to an agreement under subclause (i). *See* Pet. Br. 24-25. Rather, agreements of the most individualized, informal, nonbinding, and limited nature are fully sufficient to pass muster under that subclause. Indeed, as demonstrated at length in our initial brief, § 7(o)(2)(A)(i) was worded as it was in order to allow states which prohibit all but the most

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the option of—like a private sector employer—paying normal overtime instead.

informal public sector employee representation arrangements to have the option of entering compensatory time agreements with their employees' representatives, and thereby exempt themselves from normal FLSA overtime requirements. *See* Pet. Br. 25.

d. Respondents and their *amici* respond with assertions that in some states, including Texas, state law would prohibit employers from entering agreements under § 7(o)(2)(A)(i) even if those agreements—as is the case—need be nothing more than the most informal and nonbinding arrangements between a public employer and an employee's representative. This assertion is made with no supporting authority.

First, respondents cite materials that would prohibit public employers in Texas from entering *binding contracts* with employee representatives. Resp. Br. 24. This ignores that § 7(o)(2)(A)(i) agreements need not be binding contracts under state law, nor are they made binding by virtue of the FLSA. The only FLSA consequence of an employer's renunciation or breach of a § 7(o)(2)(A)(i) agreement is that the employer is required to pay overtime pursuant to the normal FLSA rules. *See* Pet. Br. 28-29 (discussing Texas law in relation to Amendments Act scheme).

Second, Missouri, as an *amicus*, asserts that its laws prohibit *any* employer initiated discussions with public employee unions. Mo. Br. 13 n.5. This ignores that under § 7(o)(2)(A)(i) it is the *employee* who must initiate discussions by designating a representative for that purpose. *See* Pet. Br. 11-12.

Thus, neither respondents nor their *amici* have cited any state law that would prohibit the kinds of informal and nonbinding arrangements at issue here.[7]

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[7] It is worth noting, however, that even if respondents and their *amici* had found some state law principle that would prohibit some public employer from entering into the informal and nonbinding

C. *Amici*'s "Plain Statement" Argument

Two of respondents' *amici*—but not respondents themselves—argue that this case should be decided under the "plain statement" rule of *Gregory v. Ashcroft*, —— U.S. ——, 59 L.W. 4714 (1991). *Gregory* provides that a statute will not be construed to bring certain traditional state functions under federal regulation, and thus "upset the usual constitutional balance of federal and state powers," unless Congress "make[s] its intention to do so unmistakably clear in the language of the statute." *Id.* at 4716-17. These *amici* argue that, because the Department of Labor's interpretation of § 7(o)(2)(A) is not "unmistakably clear in the language of the statute," the Department's interpretation must be rejected. *See* Mo. Br. 8-14; NACo Br. 20-24.

This argument—which has not been previously raised in this litigation—rests on a misreading of the *Gregory* rule. *Gregory* was precipitated by a controversy over the threshold question of federal coverage, *viz.*, over *whether* Congress intended to bring certain traditional state functions under federal regulation and thereby "upset the usual constitutional balance." For two reasons the *Gregory* rule and its rationale have no application here.

1. There is no controversy in this case concerning the issue of *whether* Congress intends federal law to control the compensatory time and overtime pay practices of respondents that are at issue. Congress clearly does so intend. Congress *unmistakably* brought these employment practices under federal regulation in 1974, when

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arrangements described in subclause (i), this would still not merit altering the operation of the statute. The consequence would simply be—as we have noted—that such an employer would be required to pay its employees the same overtime compensation that any private sector employer would be obliged to pay. *See supra* at 12. This consequence would provide no reason for refusing to give effect to the reasonable statutory understanding contained in the Department of Labor's regulation.

the Legislature "extend[ed] FLSA coverage to virtually all state and local government employees." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985) (citing 88 Stat. 58, 60); *see also* 29 U.S.C. §§ 203(d), (e) & (x). And, in 1985, Congress left the coverage of the FLSA unchanged in all relevant respects, even as the Legislature changed the content of the relevant rules. *See* Pet. Br. 13 & n.6. Thus, the only issue here involves the precise content of the federal regulatory scheme, *not* the issue of federal coverage. *See generally* Pet. Br. 9 n.4 (describing federal labor standards, including § 7(o)(2)(A), that clearly govern a public employer's use of compensatory time off).

As just stated, *Gregory v. Ashcroft*, in contrast, involved a controversy over the threshold question of whether Congress intended to assert federal authority over traditional state practices that had *not* previously been subject to federal authority. Only in that context did the Court—or, indeed, could the Court—describe the issue as whether Congress intended, by the action in question, "to upset the usual constitutional balance of federal and state powers." 59 L.W. 4716. *Gregory's* requirement of extraordinary clarity only makes sense with respect to the congressional decision that represents such an extraordinary expansion of federal coverage. To place the same requirement of extraordinary clarity on Congress with respect to *all* legislative decisions affecting the States, even after Congress has unmistakably made the threshold decision regarding coverage, would be to obstruct the ability of Congress to formulate rational policy in an area in which the Legislative Branch determined that it is necessary and proper to act.

In essence, the *amici* who raise *Gregory* seek to transform the *Gregory* rule into one that decides every controversy regarding the meaning of a federal enactment that relates to the States in the States' favor. And, as these *amici* make clear, one of the consequences of this extreme

rule would be to all but eliminate Congress' right to utilize federal administrative agencies to elucidate its enactments. *See, e.g.*, Mo. Br. 9 (urging that any ambiguity in a statute should be resolved in favor of the State); NACO Br. 22-23 (urging that there be no deference to agencies under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) in cases involving the States). Given the myriad and complex areas where federal enactments unmistakably apply to state activities, such an approach would severely undermine the ability of the Federal Government to exercise its constitutionally delegated powers to deal with *national* problems in a manner that furthers the public interest.

2. Applying the *Gregory* rule to the instant case would be particularly inappropriate. The provision at issue here was part of a legislative compromise that was undertaken at the behest of the States, and that was designed *to lessen* the burdens placed on the States by prior legislation that had *unambiguously imposed substantially greater burdens*. *See* Pet. Br. 15-18 (describing history of Amendments Act).[8] Under such circumstances, to adopt a rule that would resolve every possible legislative ambiguity in favor of the States might ultimately frustrate the very process of conciliation between Congress and the States that is the linchpin of our Federal system in this area.

The Amendments Act represents the success of legislative efforts by state and local governments to obtain relief from far clearer and more certain—but far less flexible—statutory requirements. Relief was obtained through the process of reaching complex compromises with those representing other interests. If this Court creates

[8] *See also* Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later* (forthcoming 1993) (document lodged with Clerk of the Court by *amicus* National Association of Counties, *see* NACo Br. 27 n.24) (treating Amendments Act as legislation relieving States of burden rather than imposing burdens, *see* IV-3 through IV-6, IV-15 through IV-17).

a rule under which any possible ambiguities in such compromises will be judged victories for state and local governments, compromises will likely be far more difficult to reach in the future. Put simply, under such a rule, there will be every incentive for those other interests to insist on existing legislative language that binds the States to clear and unambiguous regulatory standards, even though those standards are more onerous to the States than more flexible and more accommodating—but less than "unmistakably clear"—alternatives. *Cf.* Easterbrook, *Forward: The Court and the Economic System*, 98 Harv. L. Rev. 4, 46-51 (1984) (when legislation is the result of compromises among divergent groups, rules of statutory construction must respect the limits regarding what each group obtained, which together represent the legislative judgment reached).

CONCLUSION

For the reasons in petitioners' initial brief and in this reply brief, the judgment below should be reversed.

Respectfully submitted,

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